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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. [redacted]111

PHILLIPS PETROLEUM COMPANY, Appellant,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and NATURAL GAS PIPELINE COMPANY OF AMERICA, Appellees.

No. [redacted]112

PHILLIPS PETROLEUM COMPANY, Appellant,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellees.

No. [redacted]113

PHILLIPS PETROLEUM COMPANY, Appellant,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and PANHANDLE EASTERN PIPE LINE COMPANY, Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

ADDENDUM TO BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 953

PHILLIPS PETROLEUM COMPANY, Appellant,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and NATURAL GAS PIPELINE COMPANY OF AMERICA, Appellees.

No. 954

PHILLIPS PETROLEUM COMPANY, Appellant,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and MICHIGAN-WISCONSIN PIPE LINE COMPANY, Appellees.

No. 955

PHILLIPS PETROLEUM COMPANY, Appellant,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and PANHANDLE EASTERN PIPE LINE COMPANY, Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

ADDENDUM TO BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellant requests permission to file this addendum to brief in opposition to the motion to dismiss in these cases to call attention to a relevant decision by the United States Court of Appeals for the Fifth Circuit handed down subsequent to the filing of appellant's principal brief in opposition to the motion to dismiss.

The decision to which reference is made is in the case of *Deep South Oil Co. of Texas v. Federal Power Commission*, No. 15849, in the United States Court of Appeals for the Fifth Circuit, entered June 29, 1957, and not yet officially reported.

In that case the Court held that "all interstate wholesale sales of natural gas," including sales by independent producers of raw natural gas at the wellhead before processing, are in interstate commerce and are subject to the "exclusive" jurisdiction of the Federal Power Commission. The Court further held that such sales are not within Section 1(b) of the Natural Gas Act exempting "the production and gathering of gas." Such decision is fully supportive of the position of appellant in these cases.

For the convenience of the Court a copy of the opinion in the *Deep South* case is attached.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15849.

DEEP SOUTH OIL COMPANY OF TEXAS,
PETITIONER,

versus

FEDERAL POWER COMMISSION, RESPONDENT.

Petition for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

(June 29, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This case comes to us on the petition of Deep South Oil Company of Texas to review, pursuant to Section 19(b) of the Natural Gas Act,[1] order of the Federal Power Commission determining that Deep South is a "natural-gas company" as that terms is defined in the Act.[2]

Deep South is a small, unintegrated corporation en-

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[1] 15 U.S.C. §717r (b).

[2] By Section 2(6) of the Natural Gas Act "natural-gas company" is defined to mean "a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

gaged in the exploration for and the production of oil and gas. Its properties are located in the State of Texas, and its oil and gas facilities consist only of oil and gas well equipment, including flow lines, heaters and separators, together with such valves, tanks, and meters as are required for the operation of its wells and lines. As revealed by the record before us, Deep South owns or has an interest in and operates fourteen wells in the Big Hill Field located in Jefferson County, Texas. Five of these wells produce "casinghead gas"[3] and nine produce "full stream" or "gas well gas,"[4] and all of the gas from these wells which is not used in the field for drilling purposes by Deep South or other operators is sold to Texas Gas Corporation pursuant to a contract which was executed on February 15, 1952, for a term of twenty years. This agreement by its terms provide that the leases and lands which Deep South owns or acquires in the Big Hill area are "dedicated" to the performance of the contract, and that the gas shall be delivered at each of Deep South's wells located on the dedicated leases in a full stream, *in its natural state, without the extraction therefrom of any gasoor other liquefiable hydrocarbons.*[5] Prior to delivery under the contract, the "casing-head gas" is separated from the oil with which it is produced at a field separator, and the

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[3] "Casinghead gas" is gas that is produced along with oil from an oil well and ordinarily consists of fixed gases, principally methane in bulk with other hydrocarbons ranging from the lighter ones down to the quite heavy ones. Mixed with those hydrocarbons are water vapor, acid gases, hydrogen sulphide and carbon dioxide, in addition to other fairly common diluents such as nitrogen, helium, and various sulphur compounds, and impurities such as drilling mud, rust, sand and dirt.

[4] "Full stream gas wells," "straight gas wells," and "gas distillate wells" are synonymous terms and the gas produced therefrom is "gas well gas," which contains fewer liquefiable hydrocarbon than gas produced in association with oil.

[5] All italics herein our.

"full stream gas" is treated for the removal of water at a so-called "free-water knockout." Within a few feet from the point at which the gas leaves the aforementioned mechanical devices, it passes into Texas Gas' meters which are located on the leases near the wellheads from which the gas is produced. There it is measured and delivered and title thereto passes to Texas Gas. Thereupon the gas then moves from these metering points through a network of converging pipelines of progressively larger size to the purchaser's processing plant at Winnie, Texas, which is located about seven miles from the Deep South leases. During the course of this movement, the gas purchased from Deep South is commingled in the pipelines with gas which Texas Gas has purchased from other operators in the area. At the Winnie processing plant all of the casing head gas and gas well gas purchased by Texas Gas is processed for removal of water vapor and liquefiable hydrocarbons. After processing, the gas is discharged into a common sales header and pursuant to a contract between Texas Gas and Texas Eastern Transmission Corporation a portion of such gas flows into the latter's interstate transmission lines for transportation and resale in interstate commerce. This contract between Texas Gas and the pipeline company is for a minimum of fifteen years and by its terms the gas purchase contract between Deep South and Texas Gas and the gas which may be produced from the lands and leaseholds covered thereby are "dedicated" to the performance of the contract between Texas Gas and Texas Eastern.

The proceeding before the Commission which gave rise to this petition for review was initiated by Deep South when, in conformity with Rule 1.7(c) of the Commission's Rules of Practice and procedure, it filed a petition for a

declaratory order[6] in which it requested the Commission to declare that petitioner's sales of natural gas to Texas Gas are not subject to regulation under the Natural Gas Act, 15 U.S.C. §§717-717w, and that petitioner is not a "natural-gas company" within the meaning of the Act or subject to the provisions of the Commission's Order No. 174-A.[7] This proceeding, Commission's Docket No. G-2952, was consolidated for the purposes of hearing with proceedings on two similar petitions filed by Shell Oil Company and Humble Oil & Refining Company, Commissioner's Docket Nos. G-4671 and G-5261, respectively. After a hearing and upon the facts of record, the presiding examiner decided that petitioners' sales of gas, and each of them, were sales in interstate commerce of natural gas for resale within the purview of the Natural Gas Act, and that by reasons of such sales, each of the petitioners was a "natural-gas company" subject to regultaion under the provisions of the Act. Accordingly, petitioners' respective prayers for declaratory relief were denied.

Deep South, Shell, and Humble Oil thereupon filed exceptions to the decision of the presiding examiner and the Commission, after hearing oral argument thereon, issued on September 9,1955, its Opinion No. 284 and accompanying order affirming the decision of the examiner for

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[6]In its amended and supplemented petition Deep South sought declaratory relief from the Commission with respect to a sale made from a single gas well in Refugio County, Texas. Subsequent to the hearing before the presiding examiner this well became exhausted, the equipment was dismantled and all deliveries of gas from the well discontinued. For that reason, Deep South withdrew its request for relief with respect to this well, the withdrawal being made at the time of the argument before the Commission. The Commission's opinion and order contain references to this well, but the questions relating to it are now moot and are not referred to in Deep South's petition for review or discussed in its brief.

[7]See **Magnolia Petroleum Company v. Federal Power Commission**, 5 Cir., 236 F. 2d 785, cert. denied 352 U.S. 968, for a discussion of Order No. 174-A

the reasons therein stated. In its opinion the Commission noticed the fact that these consolidated proceedings presented to it for the first time the question whether sales of natural gas made before the completion of "production and gathering" are exempt from the Natural Gas Act by reason of the exclusionary provision of Section 1(b) of the Act. In resolving this question the Commission rejected petitioners' claim sthat "casinghead gas" is not "natural gas" within the meaning of the Act, and expressly affirmed the examiner's conclusion that there is nothing in the Natural Gas Act which supports petitioners' assertion that regulation under the Act is confined to fuel gas which consists "almost entirely of methane and ethane." Likewise, the Commission concluded that there was no merit in the contention that the sales in question are for "manufacture" and not for "resale." And, on the basis of its finding that the entire movement of the gas from the producing wells through the processing plants to consumers in other states is an uninterrupted and continuous flow, the Commission determined that the gas which is sold by petitioners is sold "in interstate commerce." Finally, the Commission concluded that none of the sales is exempt from regulation under the Act for the reason that the exemptive language of Section 1(b) does not nullify the clear and specific grant of jurisdiction over "sales of natural gas in interstate commerce for resale." Thereafter and agreeable to the provision of Section 19(a) of the Act, petitioners filed applications for rehearing of this order, which applications were on November 4, 1955, denied by order of the Commission. Whereupon, Deep South, Shell, and Humble Oil, each filed a petition for review,* praying that the orders of September 9 and No-

*Shell Oil Company's petition for review has been docketed as cause No. 15,900 and Humble Oil & Refining Company's petition has been docketed as cause No. 15,884. The three cases were consolidated for purposes of argument and submission by order of Court entered June 25, 1956, however, separate opinions and judgments will be filed and entered in each case.

vember 4, 1955, be set aside in their entirety and that this Court further determine and declare that petitioner is not a "natural-gas company" within the meaning of the Act and that its sales are not subject to the jurisdiction of the Commission.

In this review proceeding as in the proceeding which was had before the Commission, Deep South raises two issues. The first and principal point urged is that the sales made by it are not within the specific affirmative grant of jurisdiction to the Commission over sales "in" interstate commerce, for the reason that all of the relevant circumstances establish that they are "local" in character. We do not agree. In our opinion the statutory language, its legislative history and prior decisions of the Supreme Court compel a contrary conclusion. When the Act was passed in 1938, Congress declared the national policy in doing so as follows:

> "Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

In the hearings which were had before the House Committee on Interstate and Foreign Commerce prior to the adoption of the Act, Congress was fully informed as to the need for such regulation and among other considera-

tions it was cognizant of the fact that the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies. It was strongly urged to Congress that the public cannot be protected from exploitation in the prices charged for natural gas unless Government shall control not only the price charged by the companies which deliver the gas to the consumer, but also the prices of all companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution." The Committee reports on the bill which became the Natural Gas Act specifically stated that "sales for resale, or so-called wholesale sales in interstate commerce *(for example, sales by producing companies to distributing companies)* . . . have been considered [by the courts] to be not local *in character*, and even in the absence of Congressional action not subject to State regulation."[10] Accordingly, Congress provided in Section 1(b) of the Act the following:

> "*The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale*, but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

"Natural gas" is defined in Section 2(5) of the Act to mean "either natural gas unmixed, or any mixture of nat-

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[9] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess. p. 142.

[10] H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2. S. Rep. No. 1162, 75th Cong., 1st Sess. 1-2.

ural or artificial gas," and in Section 2(7) "interstate commerce" is defined as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

In numerous decisions, the Supreme Court has recognized that the Act was primarily designed to protect consumer interests against exploitation at the hands of private natural gas companies, and with particular reference to sales by independent producers the Court, in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682, said:

> " . . . we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company."

And in emphasizing the purpose of the Natural Gas Act to protect consumers, the Court at page 685 observed that:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from the regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natual-gas companies was the primary aim of the Natural Gas Act. *Federal Power Commission v. Hope Natural Gas Co., supra*, at 610. Attempts to

> weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

Having in mind the obvious purpose of Congress which was to see that there was effective regulation of all interstate wholesale sales of natural gas, it would be an exceedingly incongruous result if a statute so motivated and planned to bring about such regulation were construed so as to obtain the opposite result. To hold, as petitioner would have us do, that it may set up its own interests in complete freedom from regulation of the price of its wholesale sales would be to permit it, if it were so inclined, to engage in the every exploitation which the Act was designed to prevent. We cannot therefore subscribe to the view that the Act contemplates that petitioner or any other independent producer should be free of price regulation, if it is engaged in the sale in interstate commerce of natural gas for resale.

As to petitioner's claim that its sales are "local" in character, we think it plain that they are sales "in interstate commerce" for the obvious reason that the sale of gas originating in one state and its transmission and delivery to distributors in any other state constitutes interstate commerce. *Federal Power Commission v. Natural Gas Pipeline Company of America*, 315 U.S. 575, 582. *Cf. Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 467. The fact that the sales are made at the wellhead is immaterial for the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature

of the business: *Illinois Gas Co. v. Public Service Co.*, 314 U.S. 498, 503-504. Here, petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course, it must, "that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas Gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . ." Accordingly, and in the light of all of the uncontroverted facts, we hold that when the gas was sold by petitioner it had commenced its journey in interstate commerce.

We are likewise not more impressed than was the Commission with the claim that petitioner's sales were made for "manufacture," not for "resale." This contention is made notwithstanding the fact that all of the parties to the contract between Deep South and Texas Gas fully understood that the gas was to be resold in wholesale quantities by the buyer. In the conduct of its business, petitioner sells its gas in bulk to Texas Gas. Texas Gas in turn and at the tailgate of its processing plant resells the gas which it purchases from petitioner to an interstate transmission company for resale, as well as to intrastate customers. The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act. Nor is it of significance that the gas in the course of its interstate transmission passes through Texas Gas' processing plant. The processing herein involved is not an interruption of the

interstate journey and is not "manufacture." On the contrary, as noted above, the processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips and is merely a part of the business of transporting and marketing gas in interstate commerce. *City of Detroit v. Federal Power Commission*, D.C. Cir., 230 F. 2d 810, 820, cert. denied 352 U.S. 829. *Cf. Cities Service Gas Co. v. Federal Power Commission*, 10 Cir., 255 F. 2d 694, cert. denied 329 U.S. 773.

Petitioner also insists that the casinghead gas which it sells is not "natural gas" within the meaning of the Act. For answer we deem it sufficient to say that there is nothing in the general language used in the definition of "natural gas," quoted above, which suggests that a special or narrow or unnatural definition of "natural" was meant. Boone's Petroleum Dictionary (1952) defines natural gas as *a mixture of gaseous hydrocarbons found in nature* in many places connected with deposits of petroleum, to which the gaseous compounds are closely related. The record in this case shows that the principal constituents of natural gas which is used as a domestic or industrial fuel are methane and ethane; that casing-head gas contains methane and ethane, as well as other constituents that are valuable, such as propane, butane, and the heavier components that comprise natural gasoline; and that it is economically desirable to remove these additional components for their value. The gas sold by petitioner contains the methane and ethane which constitutes the bulk of fuel gas distributed to domestic, commercial and industrial consumers. And the extraction process to which the gas is subjected after delivery under the sales contract does not create or add to the product any amount of either of those components. Thus, it is plain that casinghead gas is not any the less "natural" gas because it contains variable amounts of other contituents.

The petitioner alternatively contends, however, that regardless of whether the sales in question are sales in interstate commerce, the transactions fall within the clause of Section 1(b) of the Act which specifically excepts from the Commission's jurisdiction the regulation of ". . . the production or gathering of natural gas." We do not at all agree, but on the contrary think that our observations in *Interstate Natural Gas Company v. Federal Power Commission*, 156 F. 2d 949, 951, supply a ready answer to this contention. There, in speaking of Section 1(b), we said:

> "[The Act] is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out. . . . Here the statute was drawn to regulate, it picked out for inclusion 'sale in interstate commerce of natural gas for resale for ultimate public consumption.' . . . Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply "to the facilities used for such [i.e. local] distribution or to the production or gathering of Natural gas.' "

The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natura

gas are not within the commission's power of regulation. However, there is nothing in the Act which suggests, either expressly or by implication, that by the exemption of production and gathering, Congress intended that the wholesale sales of natural gas in intestate commerce which are consummated before the gas has been gathered or processed should not be regarded as sales in such commerce over which the Commission was granted exclusive jurisdiction to regulate.

Petitioner argues, however, that what is involved here is "more than merely regulation of sales," for the reason that our decision herein will give rise to certain hypothetical situations predicated upon assumed future actions by the Commission, viz., that should certificates of public convenience and necessity which petitioner will apply for be refused, Deep South must close its wells and suspend operations, and that petitioner must obtain the Commission's permission before discontinuing sales from a well which has been found subject to Federal jurisdiction. No such issues are presented in the instant case, and it will be time enough to pass upon those issues if and when they are properly presented.

In the light of the foregoing it follows that the order of the Commission declaring Deep South Oil Company of Texas to be a "natural-gas company" within the meaning of the Natural Gas Act should be and the same hereby is affirmed.

AFFIRMED.

BROWN, Circuit Judge: I dissent for reasons hereafter to be filed.